314 U.S. 631

Office - Supreme Court, U.
FILED
MAY 31 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1093 114

HENRY A. B. DUNNING,
Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF.

VERNON COOK,
GEORGE ROSS VEAZEY,
Counsel for Petitioner.

The Daily Record Co. Print, Baltimore.

INDEX.

SUBJECT INDEX.

PAGE.

Petition for Writ of Certiorari 1

Statement of the Matter Involved 1

Revenue Act of 1934, Section 166 3

Jurisdiction 4

Questions Presented 4

Reasons Relied on for Allowance of the Writ 4

Brief in Support of Petition 9

Opinions below 9

Jurisdiction 9

Statement of the Case 9

Specification of Errors 10

Summary of Argument 10

Argument 11

Point 1. The decision of the lower Court is in direct conflict with Helvering v. Wood, 309 U. S. 344 11

Point 2. Section 166, as construed by the lower Court, levies a tax on Mr. Dunning measured by the income of Mrs. Dunning, but Due Process prohibits Congress from stamping her income as his to render it taxable against him 21

TABLE OF CASES CITED.

PAGE.

Blair v. Commissioner, 300 U. S. 5 24

Burnet v. Wells, 289 U. S. 670 ..... 23, 24, 25

Commissioner v. Branch, 114 Fed. (2d) 985 19

Commissioner v. Richter, 114 F2 452 (CCA3) See also Hormel v. Richter, 85 L. ed. 651 20

Corliss v. Bowers, 281 U. S. 376 22

Corning, Warren H. v. Commissioner (CCA 6th), 104 Fed. (2d) 329; 36 B. T. A. 301 ..... 16, 17

Curry v. McCanless, 307 U. S. 357 15

Douglas v. Willcuts, 296 U. S. 1 6

Dunning v. Commissioner (CCA 4th),

(1933 income case) 36 B. T. A. 1222 (Opinion Dec. 31, 1937) 7, 19, 24

(1934 income case) 41 B. T. A. 1101 (Opinion May 10, 1940) 19, 23

(CCA 4th) 118 Fed. (2d) 341 (March 10, 1941) 4, 5, 6, 7, 9, 15, 27

DuPont v. Commissioner, 289 U. S. 685 ..... 10, 18, 23

Heiner v. Donnan, 285 U. S. 312 25

Helvering v. Achelis (CCA 2nd), 112 Fed. (2d) 929 20

Helvering v. Clifford, 309 U. S. 331; 38 B. T. A. 1532; 105 Fed. (2d) 586 ..... 18, 20

Helvering v. Fuller, 310 U. S. 69 20

Helvering v. Hallock, 309 U. S. 106 ..... 18, 26, 27

Helvering v. Horst, 85 L. ed. 99 (U. S. Supreme Court) 24

Helvering v. Wood, 309 U. S. 344 ..... 4, 10, 11-14, 26, 27

Hoeper v. Tax Commission of Wisconsin, 284 U. S. 206 ..... 22, 23, 24, 25

Hormel v. Helvering, 85 L. ed. 651 18

Hormel v. Richter, 85 L. ed. 656 18

Kraft v. Commissioner (CCA 3rd), 111 Fed. (2d) 370 14

PAGE.
Lewis v. White (Dist. Ct. Mass.), 56 Fed. (2d) 390.... 21
McArthur v. Scott, 113 U. S. 340..... 15
Reinecke v. Smith, 289 U. S. 172..... 23, 24
Shanley v. Bowers (CCA 7th), 81 Fed. (2d) 13..... 6
United States v. First National Bank of Birmingham (CCA 1st), 74 Fed. (2d) 360..... 12, 15
United States v. Field, 225 U. S. 257..... 16
White v. Poor, 296 U. S. 98..... 16

TEXTS.

Blackstone, Comm., Vol. 2, 121..... 15
Tiffany, Real Property, 2d edition, Sec. 129 et seq.; 316 et seq. 13
Vol. I, Sec. 130 20

STATUTES CITED.

Revenue Act of 1924, Sec. 219..... 21
Revenue Act of 1934,
Sec. 22(a) 20
Sec. 166 ..... 3, 4, 18, 20, 21, 24, 25

Reproduced at page 3

Supreme Court of the United States

OCTOBER TERM, 1941.

No.....

HENRY A. B. DUNNING,
Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

TO THE HONORABLE CHARLES EVANS HUGHES, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner respectfully shows:

I.

STATEMENT OF THE MATTER INVOLVED.

Henry A. B. Dunning, the Petitioner, created by deeds of May 31, 1932 five trusts, irrevocable in all respects until January 10, 1937, when the trusts would terminate

if the grantor then declared that he desired no extension. The Maryland Trust Company and Henry A. B. Dunning, Trustees, were directed, in each trust, to pay first, $10,000 out of the income to Ethel Adams Dunning, wife of the petitioner; surplus income in the discretion of the Petitioner, as Trustee, might be accumulated and reinvested and become part of the corpus of the estate or might be paid under deed No. 1 to Ethel Adams Dunning, wife of Henry A. B. Dunning, under deed No. 2 to J. H. Fitzgerald Dunning, an adult son of Henry A. B. Dunning, under deed No. 3 to Katherine Ellen Dunning, an adult daughter of Henry A. B. Dunning, under deed No. 4 to H. A. Brown Dunning, an adult son of Henry A. B. Dunning and under deed No. 5 to Charles Alexander Dunning, a minor son of Henry A. B. Dunning. The Trustees were given the power to hold and possess, in each trust, 7250 shares of the capital stock of Hynson, Westcott & Dunning, Incorporated, and to receive all dividends thereon. Dunning, Trustee, during his lifetime has full discretionary powers as to the nature and character of investments to be made, including the right to sell and reinvest; he is also given the right to vote the stock placed in trust.*

Under the terms of the deeds of trust the corpus of the estate reverts to Henry A. B. Dunning at the end of the four year and ten months period, but under no possible condition can any part of the current or of the accumulated and reinvested income ever revert to the grantor. There is no restriction whatever as to the use of the income from these trusts by Mrs. Dunning. The fact is that a portion was used to pay insurance premiums

*NOTE—For copy of one of the deeds of trust see R. 39.

and on this petitioner does not dispute liability. The balance was used for miscellaneous purposes at the pleasure of the wife. The income from the trusts for the children was accumulated. Mrs. Dunning included in her return the $50,000 per annum representing the income paid by the trustees to her in the year 1934. Under each of the other four trusts the trustees paid the tax. (R. 46-49, Agreed Statement of Facts.)

On December 29, 1936, Petitioner gave notice that he desired no extension of the date of termination and the trusts therefore terminated on January 10, 1937; the investments representing the accumulated income remained in the hands of the Trustees; the stock representing the original corpus of the estate was returned to the grantor on January 10, 1937. (R. 48-49, Agreed Statement of Facts.)

The Revenue Act of 1934, Section 166 (Title 26, USCA §166, p. 478) is as follows:

"Revocable Trusts.

Where *at any time** the *power* to *revest* in the grantor title to any part of the corpus of the trust *is vested*—

(1) in the grantor, either alone or in conjunction with any person not having a substantial interest in the disposition of such part of the corpus or income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the trust or the income therefrom, then the income of such part of the trust** shall be included in computing the net income of the grantor." [Italics supplied].

---

*NOTE—The prior statute read, "at any time during the taxable year." (Act 1932, Sec. 166).

**NOTE—The prior statute inserted "for such taxable year."

The matter involved is whether the income from the five trusts should or should not be included in the personal income of Henry A. B. Dunning, the Petitioner, for the year 1934.

II.

JURISDICTION.

The basis upon which it is contended that this Court has jurisdiction to review the judgment of the Circuit Court of Appeals of the Fourth Circuit (entered March 10, 1941) is, under Section 240(a) of the Judicial Code, as amended (28 USCA §347).

III.

THE QUESTIONS PRESENTED.

(1) Is not the opinion and decision of the two prevailing judges of the Circuit Court of Appeals in this case in direct conflict with the decision of this court in *Helvering v. Wood*, 309 U. S. 344?

(2) Did Congress intend by the Act of 1934, amending Sec. 166 of the income tax law, to tax A on the income of B and, if so, does Congress have any such power under the Fifth Amendment to the Constitution?

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The lower Court's decision (118 Fed. (2) 341) is in conflict with *Helvering v. Wood*, 309 U. S. 344. It speaks of the distinction in the Wood case between a grantor's reversionary interest and his power to revest or revoke as "based upon fine technicalities" (346).

Although Congress had this very distinction in mind in enacting the 1934 Revenue Act, as was determined by this Court in the Wood case, nevertheless a majority of the lower Court declined to recognize the distinction.

The lower Court's construction of Section 166 taxes to Dunning income which was not his, in 1934, and which could never become his. The statute is thus construed, in effect, to mean that Congress has declared, in a statute headed "Revocable Trusts", that the income of trusts which are irrevocable until a later year is to be taxed to the grantor during all of the period while the trust is irrevocable. Congress has endeavored to exercise no such power. Congress has not attempted to say that, because a trust may be revoked at some future time, the result would be to make the income of that trust taxable during the irrevocable era. The British Parliament has taxed short term trusts*; Congress has not decided that because a trust has a short life of a certain number of years, it thereby is still born.

Following the terms of the statute, Dunning, in 1934, had no effective *"power,"* he was not *"is vested"* with a power, he had no power to *"revest."* The trust had to last for four years and ten months; if Dunning died earlier, the length of life of the trust became tremendously longer; when he indicated in December of 1936 that he did not want the trust to be extended, this did not shorten the predetermined minimum course of the years which the trust had to run. Dunning took Congress at its word when it drew the distinction between *reverter* and *revesting* in the Act of 1932, in force when

*NOTE—Finance Act of 1922, paragraph h, §20.1 (see 78 Law Journal —1934—376, 396), covering trusts "for a period which cannot exceed six years".

these trusts were executed. Congress, in 1934, did not change this principle; it reaffirmed the distinction; the lower Court, of literal mind, merely sees in these trusts the fact that some day they might be brought to an end by the grantor's act, and therefore concludes that this future possibility darkens all the intervening past from 1932 to 1936, inclusive, so as to justify labeling the trusts as revocable during that era. Thus the tail wags the dog. We contend the opposite.

Something was vaguely said by the lower Court about the broad powers of the trustee and about the benefits conferred upon his family. This is a case under Section 166. Mrs. Dunning was not hampered in spending the money received under these trusts.* A man may still make a gift to his wife beyond the support required of him by law. If the wife be thrifty, she may buy insurance on her husband's life for her own benefit; if not so thrifty, she may cultivate gardens, travel, play golf or haunt the bridge tables. This trustee had no power to hold the securities in his own name individually, no power to invade the corpus for the benefit of the cestuis, no power to transfer accumulated corpus or income to himself, and no power to revoke the trust with the consent of his wife or with the consent of any other person; nor had he any power to remove the Maryland Trust Company, his co-trustee, in any possible way. Any issue of this sort was considered by the Board of Tax Appeals in the 1933 case, and the Government acquiesced in the fact found that the income was not tax-

*NOTE—"Certainly a man must be able to make his wife a gift if he wishes without affecting his marital duty. No authority has been cited for the theory that every gift by a husband to his wife must be presumed to be discharged of it. * * *" *Shanley vs. Bowers* (C. C. A. 7) 81 F. (2d) 13, discussing *Douglas v. Willcuts*, 296 U. S. 1, and see R. 49. The deeds did not dedicate the trust income to the purpose of meeting an obligation of the grantor.

able to the grantor on the theory that he retained control over the trust (36 B. T. A. 1222).

In brief, Congress has never taken the step of taxing short term trusts; this trust does not fall under Section 166, for the Court is dealing with a reverter and not with a vested power to revest; if Congress can be said to have intended to tax D on the income of Mrs. D by taxing Mrs. D's income in 1934, when Mr. D had no control of it, could not repossess himself of that income and could not repossess himself of the corpus during the year 1934, then Congress has overstepped the limit of its Constitutional Power.

As was said by Judge Soper, in his dissenting opinion in this case, 118 F. 2d at 346:

> "*Corliss v. Bowers*, 281 U. S. 376, 50 S. Ct. 336, 74 L. Ed. 916, involved a trust in which the tax-payer-grantor 'fully reserved the power at any moment to abolish or change the trust at his will', and thereby retained 'actual command over the property taxed—the actual benefit for which the tax is paid'. Here the income in question for the year 1934 had been irrevocably transferred to the wife, and placed entirely beyond the domination of the taxpayer. If full significance is given to this controlling fact, there is no occasion to indulge in the interesting speculation as to how long the term of a trust, subject to a future power of revocation, must be in order to obtain the protection of the Federal Constitution."

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Fourth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court had in the case num-

bered and entitled on its docket No. 4730, Guy T. Helvering, Commissioner of Internal Revenue, Petitioner on Review, v. Henry A. B. Dunning, Respondent on Review, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment herein of said Circuit Court be reversed by this Court, and for such further relief as to this Court may seem proper.

Respectfully submitted,

VERNON COOK,

GEORGE ROSS VEAZEY,

Counsel for Petitioner

Dated May 28, 1941.

Supreme Court of the United States

OCTOBER TERM, 1941.

No.....

HENRY A. B. DUNNING,
Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. Opinions Below.

The opinion of the Board of Tax Appeals is reported in 41 BTA 1101. (R. 9-22) The opinion of the Circuit Court of Appeals of the Fourth Circuit is reported in 118 F.2 341. (March 10, 1941) (R. 68-79)

II. Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (28 USCA Sec. 347).

III. Statement of the Case.

See Heading I of the Petition for Certiorari, above, "Statement of the Matter Involved".

IV. Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding taxpayer taxable on the income here involved.
2. In construing Sec. 166 so as to tax the income of the taxpayer.
3. In holding that Sec. 166, as construed by the Circuit Court of Appeals, does not deprive taxpayer of his property in violation of the due process of law clause of the United States Constitution, Article of Amendment No. V.
4. In holding the taxpayer taxable under Helvering v. Wood, 309 U. S. 344, and Du Pont v. Commissioner, 289 U. S. 685.
5. In reversing the decision of the Board of Tax Appeals.

V. Summary of Argument.

Petitioner contends,

1. The decision of the lower Court is in direct conflict with Helvering v. Wood, 309 U. S. 344.
2. Section 166 of the Revenue Act of 1934, as construed by the lower Court, levies a tax on Mr. Dunning measured by the income of Mrs. Dunning, but due process prohibits Congress from stamping her income as his to render it taxable against him.

VI. ARGUMENT.

Point 1.

THE DECISION OF THE LOWER COURT IS IN DIRECT CONFLICT WITH HELVERING V. WOOD, 309 U. S. 344.

Under the Dunning trusts, the three adult children, the wife, and the minor child each had a fixed estate for four years and ten months. Dunning had no discretion to shorten, to recall to himself, to abbreviate, or to lessen that fixed estate. Its principal and income alike were untouchable by him for nearly five years.

Dunning did acquire, under the instruments, a right to determine whether the trusts should last after January 10, 1937, but if he died before 1937, the trusts had to last longer. On December 29, 1936, he elected that the trusts should terminate January 10, 1937. The corpus returned to him in 1937. But in 1934, or 1935, or 1936 (for the year 1936) he was completely powerless. No act of his could have caused trust corpus or income for said years to return to him, by way of revesting or by way of reverter.

In 1937 the corpus returned to Dunning by way of reverter, for the residue after the end of the particular estate came back, to the original owner, by operation of law.

In this case the lower Court has held, in effect, that because Dunning might have lengthened the particular estate (though he could not shorten it), it follows that the return of the residue over and above the particular estate has come back to him, not by reverter, but by the exercise of a power vested in him in 1934 to revest the same in himself.

The Commissioner does not contend that Dunning, under the Maryland law, could have revoked this trust before the end of the term. The Dunning trusts had no collapsible features whatever. A rubber band, having a minimum circumference fixed at the factory, may expect to find itself stretched in the hands of the buyer.

In the Wood case, involving 1934 income under Section 166, the original trust was due to expire in 1934, but had been extended in 1932 so as to run on until 1936. In substance a new trust of 1932 was created for a four year term, subject to earlier termination by the death of the grantor or of his wife before 1936.

In the Wood case, when the cestui wife's estate for years was over—and the grantor had fixed that time as 1936—"all property then held in trust" was to be transferred and delivered (37 BTA 1065) to the grantor.

The Board held that the grantor was not taxable—"The petitioner did not own that income nor did it remain his in substance, for, under the terms of the grant and for the specified period of time, the beneficiary had the unfettered right to receive and use the income from the trust corpus." The Second Circuit affirmed (104 F.2 1013) on the authority of *United States v. First National Bank of Birmingham* (CCA5), 74 F2d 360. This Court held that this corpus was due to return to him by way of reverter, and not by way of revesting.

Mr. Justice Douglas says:

> "Our difficulty lies not in an inability to see the similarity of those situations but in being able to say that Congress treated them the same under §166. A power to revest or revoke may in economic fact be the equivalent of a reversion. But at least in the

law of estates they are by no means synonymous. For, generally speaking, the power to revest or to revoke an existing estate is discretionary with the donor; a reversion is the residue left in the grantor on determination of a particular estate. See Tiffany, Real Property (2nd ed.) §129 *et seq.*, §316 *et seq.* Congress seems to have drawn §166 with that distinction in mind, for mere reversions are not specifically mentioned. Whether as a matter of policy such nice distinctions should be perpetuated in a tax law by selecting one type of trust but not the other for special treatment is not for us. We have only the responsibility of carrying out the Congressional mandate. And where Congress has drawn a distinction, however nice, it is not proper for us to obliterate it. That seems to us to be the case here. Whether wisely or not, Congress confined §166 to trusts where there was a 'power to revest.'"

The Court pointed out that in 1934 the Treasury had recommended that "the income from short-term trusts and trusts which are revocable by the creator at the expiration of a short period after notice by him should be made taxable to the creator of the trust", but that Congress adopted only the latter suggestion.

The whole purpose of the amendment of 1934 was to render taxable the trust which could be revoked at the end of *a short period after notice given by the grantor.* In this trust the income of 1937 is taxable to the grantor in spite of the fact that the notice was not given in 1937 (that is, during the taxable year) but was given in December of 1936. The aim of the Amendment was to render taxable the so-called year-and-a-day trusts. Under the old law, the income of 1937 would have escaped taxation because the notice was not given in 1937. The purpose of the amendment was to tax the income

of 1937 even though the notice was given a short period before the taxable year (that is, was given in 1936).*

But none of this bears upon the Dunning trust any more than this Court thought that it bore upon the trust of Meredith Wood. "When such clear choice of ideas has been made in the drafting of a specific provision of the law, its language must be taken at its face value. Section 166 is therefore not applicable to this trust since respondent is given no power to recall the corpus. He or his estate gets it at the end of the term, on the death of his wife, or on his own death—whichever is the earliest" (348). Indeed, in the Dunning trusts the case is stronger, for the untimely death of Dunning would have had the effect of prolonging the term of the trusts to the outside limit of time of the rule against perpetuities.

Dunning, under these trusts, was given no power to recall the corpus; it reverted to him by condition subsequent. The trusts, in terms, were "*irrevocable in all respects* until January 10, 1937."

> "This deed of trust shall continue in full force and effect *irrevocable in all respects* until January 10, 1937, and, subject to the exceptions hereinafter stated, shall terminate on that date, if Henry A. B. Dunning, by written notice to his co-trustee on or before December 31, 1936, declares that he desires no extension of said date of termination. If no such notice is given the above date of January 10, 1937, shall automatically be extended to January 10, 1942, and thereafter during the life of Henry A. B. Dunning from time to time the date of termination shall be automatically extended for successive periods of five years each if no notice as above specified be

---

NOTE *—As in *Kraft v. Commissioner* (CCA3), 111 F2d 370, where taxpayer retained the power to repossess the corpus by notice given 5 days before the end of any calendar year, including 1933.

given ten days before the end of any current five year period. Upon any termination of the trust the corpus of the estate (but not the accumulated income) shall revert to Henry A. B. Dunning, to be his absolutely." (R. 41)

The majority in the Court below take the position that Dunning had, in 1934, a vested power to revest the corpus as of 1937, subject to be divested in the event of his death prior to 1937.

But this view, it is submitted, is at variance with the nature of the estate created, with the nature of powers, and with the distinction between reverter and revesting, adopted by Congress and recognized by this Court.

Under these trust provisions the Trustees had, at least, an estate for years for a minimum term of four years and ten months. More strictly, the Trustees had a vested estate for the life of Dunning, subject to be divested down to the minimum term of four years and ten months by the act of Dunning if Dunning lived to 1937, and down to a term of nine years and ten months, if Dunning lived to 1942, and so on in five year stages.

2 *Blackstone Comm.*, 121.
McArthur v. Scott, 113 U. S. 340, 28 L. Ed. 1015, 1026.
Curry v. McCanless, 307 U. S. 357, 380.

Viewing the interest of the Trustees at the minimum, that is, as an estate for years, the non-taxability of the income to the grantor is convincingly stated in *U. S. v. First National Bank of Birmingham* (CCA1), 74 F2d 360. This case was decided by the Circuit Court of Appeals, First Circuit, December 18, 1934. The trust instrument conveyed realty for an ascertained period fixed in ad-

vance, the income to be used during that period for educational purposes. The income was held not taxable to the settlor of the trust. The Court said:

> "By that instrument the entire property rights in the described real estate for the period stated were irrevocably vested in the grantee, the estate granted being one limited to endure for a definite and ascertained period fixed in advance is what is known as an estate for years. * * * The corpus of the trust was the granted estate in the described property for the stated period. The income from that property during that period was the grantee's income, not the grantor's income, as it was subject to the unfettered command of the grantee, not subject to any power over it exercisable by the grantor, the source of it being a property interest or estate irrevocably vested in the grantee. * * * The income in question was not taxable against appellee's testator because he did not own that income or have any beneficial interest therein when it accrued, and did not have the power, either alone or in conjunction with any person not a beneficiary of the trust, to revest in himself the title to the property interest or estate which was the source of that income." (362)

The fact that Dunning had a power of any kind vested no estate in him (*United States v. Field*, 255 U. S. 257, 263). Similarly, there is no "power" when the instrument merely makes it possible for a trustee to terminate a trust. (*White vs. Poor*, 296 U. S. 98, 101). The fact that the donee executed (that is, formally exercised) the power did not make the power take effect until the end of the term.

In the case of *Corning v. Commissioner*, 104 F.2d 329 (CCA6), an analysis of the facts will show that the trust could be terminated by the petitioner after the death of

his father, *but in no event prior to 1937.* The question as to whether the power was vested in the grantor to revest in himself, *as of the year 1934,* was therefore an issue in that case, and the Court clearly determined that the rights of ownership in the grantor were not of the vested character which would subject the income of the trust for 1934 to taxation by Congress. The grantor did not have the equivalent of ownership which would make it possible for the act of Congress to fasten upon it. Obviously the statute should be construed to have a meaning within constitutional limitations. The statute could not have meant that the trust was revocable in the year 1934.

The Commissioner may perhaps contend that, while Dunning's right to receive the corpus was contingent on his being alive in 1937, nevertheless the exercise of the power was vested in him in 1934.

The short answer to this is furnished in the Corning case, at 332,

> "The distinction is difficult to apprehend. It is not consonant with generally accepted concepts of powers, for a power which is not presently exercisable and may never be capable of being exercised does not exist. 1 Sugden on Powers, 3d. Am. Ed. 371, 372. It is difficult, therefore, to comprehend that one may be vested with a power that is not presently nor with certainty exerciseable in futuro."
>
> *Corning v. Commissioner* (CCA6), 104 F2d. 329, 332.

To which it may be added that Dunning's right to terminate was contingent on the passage of time to 1937 accompanied by his own survival until 1937—a contin-

gency which might never arise. And it cannot be said that Dunning had a power, vested in him in 1934, to recall corpus or income to himself for the period throughout which he had abandoned that income.

Respondent may seek to contend that the lower Court should be sustained on the basis of *Helvering v. Hallock*, 309 U. S. 106, *Helvering v. Clifford*, 309 U. S. 331, *Hormel v. Helvering*, 85 L. ed. 651 or *Hormel v. Richter*, 85 L. ed. 656. But this case rests on Section 166, the rules for which have been laid down in the Wood case. In the cases referred to the trustee's powers were far more far reaching than in the Dunning trusts, (such as the power to shorten with beneficiary's consent, in the Richter case, the power to remove the co-trustee, in the Hormel case, the power to hold trust funds individually and pay or withhold the income, in the Clifford case); the Board of Tax Appeals, the initial finder of fact, has ruled in favor of Dunning in both the 1933 and 1934 cases, and, in the latter instance, the decision was made (May 10, 1940) after consideration of both the Wood and Clifford decisions. (R. 9, 14, 16) Nor is the lower Court's reference to *DuPont v. Commissioner*, 289 U. S. 685, a relevant citation, for the Commissioner was "following the command of Section 219(h)," a statute which, by definition, specifically included trusts whose income "is or may be applied to the payment of premiums on policies," and the trusts in question, by their own terms, came within the statutory definition (see pages 687 and 688).

The issues as to whether Dunning reserved actual control, or command over economic benefits, has been twice decided by the Board of Tax Appeals with respect to these trusts.

In the decision in the 1933 income tax case, the Board said (and the Government accepted the ruling):

> "Since it is concluded that petitioner transferred completely the H. W. and D. stock to the trusts, we do not believe that powers of management of the securities in the trust, or the discretionary power with respect to the sale of trust property, reinvestment of proceeds, or the right to vote the H. W. and D. stock held by the trustees constituted any such reservation of power in the petitioner, as an individual, over the economic benefits or enjoyment of the property such that we should disregard the complete transfer of the stock to the trust and tax the petitioner on dividends and income received by the trust".
>
> (36 B. T. A. 1222 at 1227).

In the second Dunning case, 41 B. T. A. 1104, the Board said:

> "The income which the respondent seeks to tax as that of the taxpayer is that of trusts which must be assumed here to be juristic entities, for tax purposes, which the taxpayer did not and could not receive at any time." (R. 13)

The Government in the Dunning case is asking this Court to invent a statute taxing short term trusts.

It is thought, then, that it can be fairly said that the Wood case recognizes (1) that the return of the corpus to the grantor at the end of the term is by reverter,* that is, by operation of law rather than by an interfering predetermining act of the grantor (for, after all, the estate would have reverted to him at the end of the term

---

NOTE *—See, recently, Commissioner v. Branch (CCA1), 114 F2d 985, 986, 987.

in the absence of any provision on the subject in the trust,* (2) that Congress recognized the common law distinction in the statute; (3) that the Amendment does not tax 1934 income of a trust whose end may be effected, if at all, for the first time in 1937; (4) that neither Wood nor Dunning, in 1934, was "is vested" with an effective "power" to "revest" in that year; and (5) that a trust for a limited period does not fall within Section 166.**

The Court, in this pending case, does not have before it any issue as to the applicability of Section 22(a) of the Revenue Act. The original letter of the Commissioner, (R. 37) attempting to impose the additional assessment on Dunning, is not based on Section 22(a) and makes no reference thereto; the Board of Tax Appeals was not asked to pass on the point; the Commissioner's brief filed before the Board makes no reference to that section (R. 60-63) and the Circuit Court of Appeals said that its application of Section 166 made it unnecessary for the Court to discuss the doctrine of *Helvering v. Clifford* or the decisions with respect to the Commissioner's right to raise Section 22(a) for the first time on appeal.

Helvering v. Fuller, 310 U. S. 69, 76.

NOTE *—"If one who has an estate in fee simple, on creating a lesser estate in favor of another by conveyance, undertakes expressly to limit, by the same instrument, an estate in fee simple in his own favor, such limitation is nugatory, as being merely a transfer to himself by himself of what he already has. It is an attempt to give to himself as a remainder what he has as a reversion."

Tiffany on Real Prop. (Ed. 1920) Vol. I, Sec. 130.

NOTE **—See Helvering v. Achelis (CCA2), 112 F2d. 929. Note the abandonment by the Government of the contention, in the Richter case (85 L. ed. 656), on stipulated facts, that the trust fell within Section 166—*Commissioner v. Richter* (CCA3), 114 F2d. 452.

2.

SECTION 166, AS CONSTRUED BY THE LOWER COURT, LEVIES A TAX ON MR. DUNNING MEASURED BY THE INCOME OF MRS. DUNNING, BUT DUE PROCESS PROHIBITS CONGRESS FROM STAMPING HER INCOME AS HIS TO RENDER IT TAXABLE AGAINST HIM.

Section 219(g) of the Revenue Act of 1924 was the predecessor of Section 166. It was in 1924 that the Act took the form carrying the words "at any time during the taxable year." In the House the Bill had this form:

> "Where the grantor of a trust reserves a power of revocation which if exercised would revest in him title to the corpus of the trust then the income of such trust shall be included in computing the net income of the grantor."

"At any time during the taxable year" was inserted in the Senate.

The Senate Finance Committee said this:

> "This section provides that when the grantor of a trust reserves the right to change the trust in favor of himself, the income is taxed to the grantor. The subdivision of the House Bill has been rewritten in order that there shall *not* be taxed to the grantor the *income of a trust as to which the grantor has a power of revocation subject however to a condition which has not happened.*" (Italics supplied.)

In 1932 Judge Brewster, in Massachusetts, pointed out, with reference to the change made in the Senate above referred to, that "it was deemed wise to add provisions excepting from the operation of the law income of a trust as to which the grantor's power of revocation was subject to a condition that had not happened." *Lewis v. White*, 56 F.2d 390, 392.

Corliss, in 1922, established a trust under which the grantor "may, from time to time, during the continuance of the trust . . . modify or alter in any manner, or revoke, in whole or in part, this indenture and the trust then existing . . ." Mr. Justice Holmes pointed out, in 1930 (*Corliss v. Bowers*, 281 U. S. 376, at 378), that taxation is concerned with actual command over the property taxed.

With this background, then, of Mr. Justice Holmes' statement in 1930, and with the recognition by Judge Brewster, in 1932, that the power of Congress to tax is concomitant with the power of the grantor to reach and apply the income, the present language of the Amendment of 1934 should be considered.

It is not to be supposed that Congress would enact a statute, headed Revocable Trusts, with the idea of making the income of a trust presently taxable because at some future time (beyond the taxable year) the grantor would reserve to himself the right of revocation. Yet this is precisely what the majority of the lower Court has held. Though Dunning had no command over the income, in 1934, it is said that the statute taxes that income. Thus the grantor is taxed because of income which belonged to his wife.

Mr. Justice Roberts, recognizing that the wife's income is in the fullest degree her separate property and in no sense that of her husband, says

> "that which is not in fact the taxpayer's income cannot be made such by calling it income."
>
> *Hoeper v. Tax Commission of Wisconsin*, 284 U. S. 206.

In the Hoeper case the Court had before it a Wisconsin income tax statute which expressly authorized an assessment against the husband of a tax computed on the combined total of his and of his wife's incomes and augmented by surtaxes resulting from the combination. The Court held that the attempt by a state to measure the tax on one person's property or income by reference to the property or income of another was contrary to due process of law as guaranteed by the Fourteenth Amendment.

Reinecke vs. Smith, 289 U. S. 172, 177, shows that it is properly within the power of Congress to draw within the income taxing field and consequently levy a tax upon "a settlor who at every moment retains the power to repossess the corpus and enjoy the income * * *" (177). But the reason why this is allowable is also given, and that reason is because that "settlor has such a measure of control as justifies the imposition of the tax upon him". (177).

In *Dunning v. Commissioner* the taxpayer, throughout the taxing year of 1934, had no power to repossess the corpus and no power to repossess the income.

When the statute commands the levy of a tax on the income of a trust which "is or may be applied" to the payment of insurance premiums, Congress has thereby exercised its legislative judgment in declaring that the trust provisions leave the grantor in a positon equivalent to that of an owner. (*Burnet v. Wells,* 289 U. S. 670, 679, and *DuPont v. Commr.,* 289 U. S. 685, 689). But, as Mr. Justice Cardozo points out in the Wells case (681, 682), "Trusts for the preservation of the policies of insurance involve a continuing exercise by the settlor

of a power to direct the application of the income along predetermined channels. In this they are to be distinguished from trusts where the income of a fund, though payable to wife or kin, may be expended by the beneficiaries without restraint, may be given away or squandered, the founder of the trust doing nothing to impose his will upon the use".

In the Wells case, legislative judgment was that grantor's continuing direction as to how the trust's income was to be applied was the fair equivalent of an ownership of a kind that should be taxed.

But Section 166, as construed by the Court below, lays a tax, not on an equivalent of ownership, but on the equivalent of abandonment.

Mrs. Dunning was the owner of an equitable interest in the corpus. She could have compelled the performance of the trust's undertakings. If she had assigned that interest, the assignee would have paid the income tax (*Blair v. Commr.*, 300 U. S. 5, 13). And it is ownership to which tax liability attaches (*Blair v. Commr.*, p. 12; *Hoeper v. Wisconsin*, 284 U. S. 206). Dunning could no more have claimed this income than if he had given or leased a farm to his wife, and had later tried to claim the crops himself during the term of the gift or lease. (*Helvering v. Horst*, 85 L. ed. 99, 103). It is plain that where a settlor at every moment retains the power to repossess the corpus he has such a measure of control as justifies the legislative imposition on him as the person having the actual command over the property taxed (*Reinecke v. Smith*, 289 U. S. 172, 177).

Section 166, as construed by the majority of the lower Court, is arbitrary. The lawmakers have located the

equivalent of ownership, or a similitude of ownership, where there was no ownership at all. They have imposed a "burden unrelated to privilege or benefit," within the distinction drawn in *Burnet v. Wells* (p. 679).

Strangely enough, the lower Court italicizes this passage from a Tax Magazine Article,

> "A term running for one or two years, subject to a future power of revocation, seems to be sufficiently within the grantor's control for taxation purposes. But where this term extends beyond four or five years, the alleged power or control seems to shrivel away. Taxation based upon such distant future right would appear violative of the Fifth Amendment." (R. 75)

It cannot be disputed that a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert is so arbitrary and unreasonable as to cause it to fall before the due process of law clause of the Fifth Amendment.

> *Heiner v. Donnan*, 285 U. S. 312, 325, 326.
> *Hoeper v. Wisconsin*, (supra).

But, it is submitted, Section 166, as shown by its legislative history, and by a reasonable reading of the language used, was never designed to be so narrowly or so literally understood, as it is expounded by a majority of the Court below. Considered either from the technical or from the substantial point of view, the statute should be construed to have a meaning within constitutional and historical bounds. That reasonable interpretation is this:

> If a trust be irrevocable, then, as long as it is irrevocable, the income tax is to be paid by the equitable owner. In the year when the trust is

> revoked (in this case, 1937), by notice given shortly before the year when the revocation is effective, then the donor's control, or command of benefits is reasserted, and the tax burden is thereafter his.

Putting the matter in a somewhat different way, it comes to this. The Supreme Court in *Helvering v. Wood* had to decide whether the difference between a reverter and a power to revest was too fine and technical a distinction to be considered in construing a tax law. The earlier case of *Helvering v. Hallock*, 309 U. S. 106, indicated that income tax laws were not to be restricted by technical common law rules in regard to estates. The Supreme Court was, therefore, confronted with the question as to whether or not the distinction above mentioned was too fine and technical for a tax case. They held that it was not. That on the contrary it was a distinction which, in view of the language of the Act of Congress and the discussion of the proposed Act while in Congress, was not too technical to be applied in construing a tax law, but on the contrary was one which should be heeded. As stated by this Court, the matter is presented as follows:

> "Whether as a matter of policy such nice distinctions should be perpetuated in a tax law by selecting one type of trust but not the other for special treatment is not for us. We have only the responsibility of carrying out the Congressional mandate. And where Congress has drawn a distinction, however nice, it is not proper for us to obliterate it. That seems to us to be the case here."

As we see it, Judge Dobie does not agree with the above statement, but on the contrary he thinks that the distinction should be obliterated and proceeds to do it in the following language:

> "In apparent opposition to the spirit of the earlier decision of *Helvering v. Hallock,* the decision in the Wood case was based upon fine technicalities. The Court went to great extremes and split many hairs to hold that a grantor's reversionary interest in a five-year term trust did not come within the terminology of Section 166."

This can only mean that in the opinion of Judge Dobie the decision in *Helvering v. Wood* was a wrong decision, the result of splitting many hairs, and he does not propose to follow it. Surely in so doing he has clearly gone beyond the powers of the lower Court.

Respectfully submitted,

VERNON COOK,

GEORGE ROSS VEAZEY,

Counsel for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 114

HENRY A. B. DUNNING, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The majority and minority opinions in the Board of Tax Appeals (R. 9–22) are reported in 41 B. T. A. 1101. The opinion and dissenting opinion in the Circuit Court of Appeals (R. 68–78) are reported in 118 F. (2d) 341.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 10, 1941 (R. 78–79). The petition for a writ of certiorari was filed May 31, 1941. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In 1932 the taxpayer created trusts for the benefit of his wife and children, naming himself and a trust company as trustees. The property transferred in trust consisted of shares of stock of a corporation of which taxpayer was the president and controlling stockholder. Under the trust terms, he reserved the right alone to vote the stock, to sell the same, and to select reinvestments; also to direct the disposition of income in excess of stipulated amounts payable to his wife. He also reserved the right to terminate the trusts in January 1937. He actually did this and the corpora were returned to him in accordance with the provisions of the trust instruments. The taxpayer conceded taxability as to the portion of income paid to his wife and used by her to pay premiums on policies of insurance on his life. Is he also taxable under Sections 166 and 22 (a) of the Revenue Act of 1934 on the balance of the income of the trusts for 1934?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 10–16.

STATEMENT

The facts found by the Board of Tax Appeals (R. 10–12), supplemented by other stipulated

facts (R. 46–59, 23–30, 39–45), may be summarized as follows:

On May 31, 1932, the taxpayer executed five deeds of trust to the Maryland Trust Company and himself, as trustees, conveying stock in Hynson, Westcott & Dunning, Inc., to be held in trust for the benefit of his wife and children (R. 10).

Taxpayer was president and chief stockholder of Hynson, Westcott & Dunning, Inc., being the owner of approximately 95 percent of all its outstanding stock (R. 46, 48).

Under the terms of the trusts, the taxpayer reserved the right alone to vote the stock placed in trust as well as the sole right to buy or sell any securities or other assets making up the trust estates (R. 24–25, 28, 49).

Each of the trust deeds contained the following additional provisions (R. 10–11, 25–26):

> This deed of trust shall continue in full force and effect *irrevocable in all respects* until January 10, 1937, and, subject to the exceptions hereinafter stated, shall terminate on that date, if Henry A. B. Dunning, by written notice to his co-trustee on or before December 31, 1936, declares that he desires no extension of said date of termination. If no such notice is given the above date of January 10, 1937, shall automatically be extended to January 10, 1942, and thereafter during the life of Henry A. B. Dunning from time to time the date of termination shall be automatically ex-

tended for successive periods of five years each if no notice as above specified be given ten days before the end of any current five year period. Upon any termination of the trust the corpus of the estate (but not the accumulated income) shall revert to Henry A. B. Dunning, to be his absolutely.

The trust shall furthermore continue after January 10, 1937, or after the end of any subsequent five year extension in either of the following events:

(a) If Henry A. B. Dunning dies before January 10, 1937, or before the end of any five year extension of said date which may become effective, then the trust both as to corpus and accumulated income shall continue from the day of his death upon the terms and for the period hereinafter fully set forth.

(b) If Henry A. B. Dunning is living on January 10, 1937, and the trust then terminates as to the corpus, or if at the end of any five year extension of said date which may become effective, the trust then terminates as to the corpus, then the trust as to the accumulated income shall nevertheless continue from said date upon the terms and for the period hereinafter fully set forth.

Each deed further provided that $10,000 of the yearly income from the corpus should be paid to the settlor's wife, Ethel Adams Dunning. The surplus income was, in the discretion of Henry A. B. Dunning as trustee, either to be accumu-

lated or paid to various named beneficiaries, not including Henry A. B. Dunning. As the quoted provisions indicate, if any trust were terminated as to corpus, or if the settlor died prior to January 10, 1937, the accumulated income was to continue in trust upon terms thereinafter set forth. If the settlor died before January 10, 1937, or before the expiration of any succeeding five-year period, regardless of notice of earlier termination by the settlor, each trust was to continue both as to corpus and income upon those same terms. These terms were, in substance, that the trust was to continue for 21 years after the death of the last survivor of the wife and four named children, and the trust property was thereupon to be divided among the then living issue of the children of the settlor (R. 11–12).

In 1934 the taxpayer's wife received $50,000 from the five trusts and expended it as follows (R. 12):

Premiums on policies of life insurance	$30,586.56
Household expenses	7,310.00
Charities	2,353.00
Income tax	4,718.26
For the benefit of her daughter, Catherine Kersten	3,510.00
For the benefit of her son, H. A. Brown Dunning	825.00
For the benefit of her son, Charles Alexander Dunning	750.00

Taxpayer's wife spent the above sum of $30,586.56 in paying premiums on insurance on his life, at his suggestion (R. 12).

On December 29, 1936, taxpayer terminated the trusts in accordance with the provisions therein contained, and the *corpora* were returned to him.

The investments, comprising accumulated income, were not returned to him, however, nor did he receive any of the trust income for 1934 (R. 12).

The Commissioner attributed all of the income for 1934 of all of the five trusts, including the above amount received and expended by taxpayer's wife, to the taxpayer for that year (R. 12).

In the proceedings before the Board of Tax Appeals, the taxpayer conceded that he was taxable under Section 167 of the Revenue Act of 1934 on the portion of the 1934 trust income ($30,586.56) used to pay premiums on policies of insurance on his life, but contested taxability as to the balance of the trust income (R. 12–13).

The Board sustained the taxpayer; but the court below reversed the decision of the Board.

ARGUMENT

1. The court below held (R. 74) that the instant trusts fall squarely within the scope of Section 166 of the Revenue Act of 1934 (Appendix, *infra*), which provides that where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested in the grantor, then the income of such part of the trust shall be included in computing the net income of the grantor. We submit that the decision is clearly correct, since the taxpayer-grantor reserved the right to revoke the trusts as of January 10, 1937, by giving notice on or prior to December 31, 1936; and if he

failed to give such notice the trusts would continue in accordance with their terms for 21 years after the death of the last survivor of the wife and four named children, whereupon the trust properties were to be divided among the then living issue of the children, subject, however, to the power of the grantor to revoke at the expiration of successive five year periods during his lifetime.

It is true that in *Helvering* v. *Wood,* 309 U. S. 344, upon which the taxpayer relies (Pet. 4–5; Br. 12–13, 27), this Court held that the grantor was not accountable under Section 166 for income of a trust for a short term of years at the expiration of which the corpus was to revest in him. But that case is distinguishable from the instant one because here the grantor had to give the required notice in order to get the property back (if, indeed, he may properly be said ever to have given it up, *Helvering* v. *Clifford,* 309 U. S. 331), and if he failed to give such notice, then the trusts were to continue in accordance with their terms. This distinction between a reversion and a power to revest, drawn in the *Wood* case, *supra,* pp. 346–347, was specifically noted by the court below (R. 74, 77) which concluded that the grantor here had a power of revocation and not merely a reversionary interest.

The instant decision is in accord with the decisions of other Circuit Courts of Appeals (*Reuter* v. *Commissioner,* 118 F. (2d) 698 (C. C. A. 5th);

325324—41——2

Kraft v. *Commissioner,* 111 F. (2d) 370 (C. C. A. 3d), certiorari denied, 311 U. S. 671), and is not in conflict with the rule of decision in any other circuit.

Corning v. *Commissioner,* 104 F. (2d) 329 (C. C. A. 6th), relied upon by the taxpayer (Br. 16–17), was adequately distinguished by the court below (R. 73) on the ground that the power there was contingent upon the death of the grantor's father, whereas the power here was subject to no such contingency. Moreover, the Sixth Circuit itself now regards the *Corning* decision as doubtful. See *Altmaier* v. *Commissioner,* 116 F. (2d) 162, 165 (C. C. A. 6th) certiorari denied, March 31, 1941, No. 774, October Term, 1940.

2. In the court below, we urged in the alternative that the grantor was also taxable under Section 22 (a) because he remained in substance the owner of the trust properties. *Helvering* v. *Clifford, supra.* The court's application of Section 166 made it unnecessary to consider the question as to Section 22 (a) (R. 77). But since the point was properly raised in the court below even if not urged before the Board (*Hormel* v. *Helvering,* No. 257, 1940 Term, decided March 17, 1941; *Helvering* v. *Richter,* No. 516, 1940 Term, decided March 17, 1941), the essential similarity between the *Clifford* case and the one at bar may be pointed out. Here the grantor had the power to revoke the trusts at the expiration of a short period of less than five years; the beneficiaries

were members of the grantor's family, namely, his wife and four children, one of whom was a minor during the taxable year (R. 48); and the grantor as trustee reserved broad powers of control over the trust properties, including the sole rights to vote the stock of a company of which he was president and the controlling stockholder (see *Helvering* v. *Fuller,* 310 U. S. 69, 76), to sell securities of the trusts, to select reinvestments and to determine whether income in excess of a stipulated amount payable to the wife should be currently distributed to the beneficiaries or accumulated in the trusts.

We therefore submit that the grantor is properly accountable for the trust income in question under Section 22 (a), as well as Section 166 of the Revenue Act of 1934.

CONCLUSION

The decision below is correct. There is no conflict. The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
L. W. POST,
Special Assistants to the Attorney General.

JUNE 1941.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * *

* * * * * *

(U. S. C., Title 26, Sec. 22.)

SEC. 166. REVOCABLE TRUSTS.

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net in-

come of the grantor (U. S. C., Title 26, Sec. 166).

Internal Revenue Code:

> SEC. 1141. COURTS OF REVIEW.
>
> (a) *Jurisdiction.*—The Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board, except as provided in section 239 of the Judicial Code, as amended, 43 Stat. 938 (U. S. C., Title 28, Sec. 346); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended, 43 Stat. 938 (U. S. C., Title 28, Sec. 347).
>
> * * * * *
>
> (c) *Powers.*—
>
> (1) *To Affirm, Modify, or Reverse.*—Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.
>
> * * * * *

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

> ART. 22 (a)–1. *What included in gross income.*—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. (See sections

22 (b) and 116.) In general, income is the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. * * *

* * * * *

ART. 166–1 [as amended by T. D. 4629, XV–1 Cum. Bull. 140, 141 (1936), and T. D. 4759, 1937–2 Cum. Bull. 117, 118]. *Trusts, with respect to the corpus of which, the grantor is regarded as remaining in substance the owner.*—(*a*) If the grantor of a trust is regarded, within the meaning of the Act, as remaining in substance the owner of the corpus thereof, the income therefrom is not taxable in accordance with the provisions of sections 161, 162, and 163 but remains attributable and taxable to the grantor. This article deals with the taxation of such income. As used in this article, the term "corpus" means any part or the whole of the property, real or personal, constituting the subject matter of the trust.

(*b*) Section 166 defines with particularity instances in which the grantor is regarded as in substance the owner of the corpus by reason of the fact that he has retained power to revest the corpus in himself. For the purposes of this article the grantor is deemed to have retained such power if he, or any person not having a substantial interest in the corpus or the income therefrom adverse to the grantor, or both, may cause the title to the corpus to revest in the grantor. If the title to the corpus will revest in the grantor upon the exercise of such power, the income of the trust is attributed and taxable to the grantor regardless of—

(1) whether such power or ability to retake the trust corpus to the grantor's own

use is effected by means of a power to revoke, to terminate, to alter or amend or to appoint;

(2) whether the exercise of such power is conditioned on the precedent giving of notice, or on the elapsing of a period of years, or on the happening of a specified event;

(3) the time at which the title to the corpus will revest in the grantor in possession and enjoyment, whether such time is within the taxable year or not, or whether such time be fixed, determinable, or certain to come;

(4) whether the power to revest in the grantor title to the corpus is in the grantor, or in any person not having a substantial interest in the corpus or income therefrom adverse to the grantor, or in both. A bare legal interest, such as that of a trustee, is never substantial and never adverse;

(5) When the trust was created.

But the provisions of section 166 are not to be regarded as excluding from taxation to the grantor the income of other trusts, not specified therein, in which the grantor is, for the purposes of the Act, similarly regarded as remaining in substance the owner of the corpus. The grantor is regarded as in substance the owner of the corpus, if, in view of the essential nature and purpose of the trust, it is apparent that the grantor has failed to part permanently and definitively with the substantial incidents of ownership in the corpus.

In determining whether the grantor is in substance the owner of the corpus, the Act has its own standard, which is a substantial one, dependent neither on the niceties of the particular conveyancing device used, nor

on the technical description which the law of property gives to the estate or interest transferred to the trustees or beneficiaries of the trust. In that determination, among the material factors are: the fact that the corpus is to be returned to the grantor after a specific term; the fact that the corpus is or may be administered in the interest of the grantor; the fact that the anticipated income is being appropriated in advance for the customary expenditures of the grantor or those which he would ordinarily and naturally make; and any other circumstances bearing on the impermanence and indefiniteness with which the grantor has parted with the substantial incidents of ownership in the corpus.

Thus the grantor is regarded as being in substance the owner of the corpus if, in any case, the trust amounts to no more than an arrangement whereby the grantor, in the ordering of his affairs, finds it expedient to entrust for a period the title to, and custody or management of, certain of his property to a trustee, the income from such property to be used by the trustee during such period to make those expenditures which the grantor would customarily or ordinarily or naturally make and to which the grantor chooses to commit himself in advance, while the corpus is to be held intact, for return in due course to the grantor. In such a case, it is immaterial that, at the time of the creation of the trust, an irrevocable disposition or consummated gift was made of those property rights which consist of the right to the expected future income of the corpus for the specified period. On the other hand, if the grantor, incident to a definitive and permanent disposition of certain of his

property, creates the trust in order to conserve the property, not for himself but for the donees, who will ultimately enjoy it, the provisions of sections 161, 162, and 163 are applicable.

(*c*) For example, a grantor is regarded as remaining in substance the owner of the corpus of the trust, if he has placed it in trust for his son, John.

(A) for the term of three years, at the end of which time the trust might be extended for a like period at the option of the grantor and successively thereafter, but in the absence of such an extension the title is once more to revest in the grantor in possession and enjoyment; or

(B) for the term of a year and a day, then to be distributed to whomsoever the wife of the grantor shall by deed appoint (the wife not having a substantial adverse interest in the disposition of the corpus or the income therefrom); or

(C) for the term of the grantor's life, then to be distributed to John, the grantor reserving, however, the right to alter, amend, or revoke any provision of the trust instrument, upon notice of a year and a day.

In these typical cases the grantor is regarded as having retained the substantial incidents of ownership with respect to the income-producing property since the corpus will or may once more revest in himself in (A) upon the expiration of the trust period if the grantor does not exercise his option to extend the trust, in (B) upon the designation of the grantor as distributee, by a person not substantially and adversely interested, and in (C) upon the revocation of the trust instrument or an alteration or

amendment thereof, resulting in the designation of the grantor as distributee.

(*d*) If the grantor is regarded as remaining in substance the owner of the corpus the gross income of such corpus shall be included in the gross income of the grantor, and he shall be allowed those deductions with respect to the corpus as he would have been entitled to had the trust not been created.

If the grantor strips himself of the substantial incidents or attributes of ownership in the corpus retained by him so that he ceases to be regarded as in substance the owner of the corpus, the income thereof realized after the effective date of such divesting is not taxable to the grantor but is taxable as provided in sections 161, 162, and 163.

A person may have an interest that is both substantial and adverse to the grantor in the disposition of only part of the corpus or the income therefrom. If the power to revest title in the grantor is vested in him in conjunction with such person, or is vested solely in such person, there is to be excluded in computing the net income of the grantor only the income of such part.

U. S. GOVERNMENT PRINTING OFFICE: 1941